A **SAVE COST AUTO ACCESSORIES SDN BHD & ORS**

v.

ETIQA INSURANCE BHD

B HIGH COURT MALAYA, ALOR SETAR
SEE MEE CHUN JC
[CIVIL SUIT NO: 22-25-2010]
31 JANUARY 2012

C ***INSURANCE:*** *Accident insurance - Group personal accident policy - Cause of death - Deceased fell from chair at workplace and died - Whether died of fall or by spontaneous rupture of aneurysm - Whether medical evidence consistent with eye witness' testimony - Whether plaintiffs entitled to claim under policy*

D ***EVIDENCE:*** *Admissibility - Expert evidence - Post mortem report and medical report - Failure to tender as evidence - Whether admissible if makers of reports called as witnesses*

The first plaintiff had taken a group personal accident policy for
E all its employees from the defendant. On 6 June 2008, one of the first plaintiff's employees, Low Chee Koeng ('the deceased'), while at his workplace, fell off his chair and hit his head on the cement floor. The deceased sustained head injuries which subsequently resulted in his death. The plaintiffs claimed that the death of the
F deceased was an accident within the terms of the policy and hence filed a claim under the said policy. The cause of death as stated in the post mortem report was "severe cerebral oedema and subarachnoid haemorrhage". The defendant resisted the claim by contending that the brain injury was most probably caused by a
G change to hemodynamic in the brain brought about by spontaneous aneurysmal rupture with generalised sub-arachnoid haemorrhage. The defendant also sought to exclude the post mortem report and the medical reports on the basis that they were prepared from medical records and case notes which, being
H primary evidence, were not tendered as evidence. The issue to be determined by the court was whether the deceased's death was caused by the fall or by spontaneous rupture of the aneurysm.

Held (allowing plaintiffs' claim with costs):

I **(1)** Both the makers of the post mortem report and medical reports were called as witnesses and accordingly their reports could be admitted as evidence (*KPM Khidmat Sendirian Berhad v. Tey Kim Suie*, dist). (para 5)

(2) DW2's opinion, that the deceased had most probably lost his balance due to the sudden change in the hemodynamics of his brain secondary to the spontaneous rupture of the berry aneurysm causing sub-arachnoid haemorrhage before he allegedly fell, was not consistent with the evidence of the eye witness. His opinion was based on medical reports and insurance claim forms and was not within his personal knowledge and was based on the unproven facts. (paras 19-21)

(3) The mere fact of PW5 being the doctor in attendance without more did not make him bias. PW5 had prepared the medical report dated 23 August 2008 and the specialist report dated 27 October 2011 in both of which the cause of death was stated as severe head injuries as a result of the fall. His report was based on the case notes and personal handling of the patient and the conclusion in both reports remained the same. Hence PW5 could not be found to be biased. (paras 9 & 23)

(4) It was clear from the evidence that the deceased was a healthy person and from the records he had not undergone any operation or treatment at a hospital. The collective evidence of the witnesses including their reports showed that the deceased died as a result of the fall bringing about subarachnoid haemorrhage due to trauma. Hence, the plaintiffs had proved that the deceased's death was due to the accident of the fall. (paras 24 & 28)

Case(s) referred to:
KPM Khidmat Sendirian Berhad v. Tey Kim Suie [1994] 3 CLJ 1 SC ***(dist)***
Pacific Tin Consolidated Corporation v. Hoon Wee Thim [1967] 1 LNS 118 FC ***(refd)***
Robin Ellis v. Malwright Ltd 68 Con LR 121 ***(refd)***
Toth v. Jarman [2006] EWCA Civ 1028 ***(refd)***

For the plaintiffs - Poh Peng Seang; M/s Hoe & Ahmad Zaki
For the defendant - Harikannan Ragavan; M/s Jayadeep Hari & Jamil

Reported by S Barathi

JUDGMENT

See Mee Chun JC:

[1] This is a claim on a group personal accident insurance policy (the policy) taken by first plaintiff from defendant for its employees one of whom was Low Chee Keong (deceased) who died on

A 9 June 2008. Third plaintiff is the wife of deceased and a beneficiary under the policy and she also claims as second plaintiff in her capacity as the administrator of the estate of deceased. The claim is for RM400,000 which is the sum insured under the policy. Under the policy (bundle C 2-17) defendant is to pay up
B on "the Event described in the Schedule" such Event being "bodily injury caused solely and directly by accidental means which independently of any other cause shall within 12 calendar months result in death ...".

C **[2]** On 6 June 2008 at about 7.30pm while at his work place deceased fell off his chair and his head hit the cement floor. Plaintiffs claim deceased sustained head injury as a result of the fall resulting in death thereby rendering it an accident within the terms of the policy for which defendant is liable to pay up.
D Defendant is resisting the claim and says brain injury was most probably caused by a change to the hemodynamics in the brain brought about by spontaneous aneurysmal rupture with generalized sub arachnoid haemorrahage. The post mortem report has the cause of death as "severe cerebral oedema and subarachnoid
E hemorrhage". The point of contention here is what brought about the death-the fall or spontaneous rupture of the aneurysm.

[3] The fall was witnessed by an office colleague Lee Soon Wei (PW2). PW2, deceased and another colleague were in the office having a conversation. Deceased was sitting on a chair and while
F stretching his back fell and hit his head on the cement floor. While lying on the floor he said his head was painful and 5 minutes later he went into fits and became unconscious. In cross examination he disagreed deceased was sitting through the conversation not saying anything. PW2 also said deceased tidak
G goyang-goyang and while stretching his body he did not say his head or neck was painful.

Exclusion Of Plaintiffs' Documents

H **[4]** Defendant had sought to exclude the post mortem reports and the medical reports tendered by plaintiffs through the doctor who did the post mortem, Dr. Siti A'ini Syazrah binti Mohamad (PW1, bundles C, 31-32 and D, 1-2) and the medical reports confirmed and/or prepared by Dr. Andre Das the doctor who
I attended to deceased in Hospital Kajang (PW5, bundles C, 29, 33 and E, 1-2) on the basis these were prepared from medical

records and case notes which being primary evidence were not tendered as evidence. The Supreme Court case of *KPM Khidmat Sendirian Berhad v. Tey Kim Sue* [1994] 3 CLJ 1 was referred to where at p. 5 it is stated:

> Moreover the record book upon which the maker based her summary must be in evidence. In this case where summary was based on the record kept by the respondent such record must be produced except if it can be proved that the original record is lost or destroyed.

[5] The facts of the above case differ from our instant case as in that case the maker of the summary one Ah Lian was not called as a witness. Here both the makers of the post mortem report and the various medical reports in the form of PW1 and PW5 were called as witnesses to defend the contents of their reports. Accordingly their reports can be admitted as evidence although the weight to be attached to them is yet another matter.

[6] Defendant had referred to discrepancies in the reports which it said could only be answered by looking at the case notes and medical reports. On the discrepancy in time of admission deceased was first taken to Hospital Kajang arriving at 8.50pm and subsequently sent to Hospital Serdang for a CT scan before returning back to Hospital Kajang (refer to clinical sequence of events, bundle E, 1). As to the words "Clinically patient was diagnosed as subarachnoid secondary to rupture berry aneurysm" being stated in the post mortem report in bundle C, 32 and not being stated in PW5's report, PW5 had explained there were different diagnosis made one of which was ruptured berry aneurysm which was ruled out as not being probable. As to the contents of the post mortem report being changed, PW1 had prepared two reports dated 7 July 2008 and 1 July 2011 of which the words "Clinically patient was diagnosed as subarachnoid secondary to rupture berry aneurysm. Second opinion CT brain showed bilateral infarct. Active management was initiated, unfortunately patient died on 9 June 2008 were omitted from the 2nd report. PW1 had explained this related to matters not within her personal knowledge and the report should contain her post mortem findings. Upon advice from a forensic pathologist she prepared the 2nd report. This explanation is accepted as the contents of both reports in particular the cause of death remain the same other than the words referred to earlier.

A **Post Mortem Report**

[7] As stated earlier the cause of death as per the post mortem was "severe cerebral oedema and subarachnoid hemorrhage". PW1 had stated no berry aneurysm was found in the course of
B internal examination of the head. There were no bruises to the skull or skull fracture. She agreed if death was caused by trauma it should be stated in the post mortem and it wasn't so stated. She confirmed that someone can have a spontaneous rupture of aneurysm and it can cause death. The absence of external injury
C such as bruises was explained by PW1 as due to the manner of the fall and seriousness of the injury. She also stated if non hard impact subarachnoid can bleed without subdural and subgaleal being injured.

D **[8]** When asked in re examination if her post mortem finding is consistent with a patient falling backwards and hitting his head her answer was it can support the history of a fall. It was also explained although the word "trauma" is not mentioned in the post mortem the fact of deceased falling backwards and head hitting the floor indicate trauma. Although trauma was not stated
E as the cause of death it could be as a result of trauma. As between trauma and spontaneous rupture of aneurysm the findings do not point towards spontaneous rupture of aneurysm.

Specialist Report Of PW5

F

[9] PW5 had prepared the medical report dated 23 August 2008 (bundle C, 33) and specialist report dated 27 October 2011 (bundle E, 1-2). In both were stated the cause of death as severe head injuries as a result of the fall. The latter report was intended
G as a specialist report with his opinion while the earlier report was in a simple format which did not allow for elaboration such as chronology of events. His reasons for arriving at the cause of death were eyewitness account of deceased falling from chair and hitting his head; post mortem findings of bilateral temporal lobe
H injuries and petechial haemorrhages of the white matter suggested contra coup injuries and diffuse axonal injuries and these are usually caused by trauma; commonest cause of subarachnoid haemorrhages is trauma and no conclusive radiological or post mortem findings supporting other causes of the subarachnoid
I haemorrhages. His report was based on case notes and his personal handling of the patient. The fall followed by fits were the first points to suggest trauma.

[10] When referred to the specialist opinion dated 10 October 2008 prepared by Dr. Anil Sivasankaran (DW2 Consultant Neurosurgeon, bundle F, 1-4) where the cause of death is "spontaneous aneurysmal rupture with generalized sub arachnoid haemorrahage leading to severe/massive cerebral oedema & bilateral brain infarct" PW5 said this was possible but highly improbable. In the case of spontaneous aneurysmal rupture the patient has pre existing headaches; is in a state of unwell for a few hours; will deteriorate into loss of consciousness and sometimes has fits. PW5 said deceased did not have these symptoms.

[11] PW5 stated the words "Clinically patient was diagnosed as subarachnoid secondary to rupture berry aneurysm" from the case notes were not included in his report as there had been different diagnosis and this was found not probable. He agreed the post mortem did not determine what caused the subarachnoid haemorrhages. When asked if he ruled out ruptured aneurysm he clarified he didn't rule out anything but just stated the cause of death was subarachnoid haemorrahage due to trauma. Although based on post mortem it could not be determined what caused subarachnoid haemorrhages he could determine probable cause of death based on case notes and it was due to trauma. On the medical report dated 2 July 2008 which he confirmed although the word "trauma" was not stated it would be indicated by the words "alleged fall".

Specialist Opinion Of DW2

[12] At this juncture it is timely to consider what DW2 had to say in his opinion. The opinion was prepared based on medical reports and insurance claim forms. The medical reports were dated 2 July 2008 prepared by one Dr. Fazilah Hayanti Ahmad (which was confirmed by PW5) and the 1st post mortem report of PW1.

[13] In p. 3 of the opinion under the heading "My final conclusion" it is stated among others as follows:

> 1) Mr. Low Chee Keong had an alleged fall on the 6th June 2008 but was taken to hospital 7 hours later. At the A&E department of Hospital Kajang the history recorded was that he had a fit earlier and was unconscious thereafter.
>
> The most probable event would point towards Mr Low Chee Keong losing his balance, knocking his head (alleged fall) and had a full Glasgow Coma Scale (GCS) for the first 7 hours post

A trauma. However on 7th June 2008 at around 3.00 am Mr. Low would have thrown a fit and subsequently slipped into a state of coma (unconscious).

The question now arises whether Mr. Low Chee Keong had a spontaneous rupture of the aneurysm and then had an alleged fall B or did he fall first causing the aneurysm to rupture. It is well documented that trauma could rupture an aneurysm. However this is not justified by the pathology report that point towards lack of external traumas on the head, body or limbs.

C Thus Mr. Low most probably lost his balance due to the sudden changes in the hemodynamics of his brain secondary to the spontaneous rupture of the berry aneurysm causing SAH before he allegedly fell.

All the pathological findings point towards a spontaneous rupture D of the berry aneurysm followed by sub arachnoid haemorrhage (SAH) … .

[14] In Q&A 8 of his witness statement (D8) DW2 explained deceased had full GSC for the first 7 hours as if he had a lower GSC score earlier than when he was brought in then most likely E deceased would have been brought in to hospital much earlier. He stated in Q&A 10 if someone fell off a chair and had severe head injury it is impossible there are no external signs of injury. In Q&A 12 as to all the pathological findings pointing towards a spontaneous rupture of the berry aneurysm he said for the F deceased to have suffered such severe head injuries there must be some trauma to his head that would have been found at the post mortem and since there was none it led him to conclude there was a spontaneous rupture of berry aneurysm.

G **[15]** In cross examination, DW2 was of the view history of a patient is one of the criteria in arriving at a conclusion. He said it was not possible for his conclusion to be based on wrong facts such as GSC for 1st seven hours or fitted at 3am. When put a question that trauma can cause head injuries without external signs H he said it would be so for minor head injury. He was referred to an article "Subarachnoid haemorrhage: diagnosis, causes and management" at pp. 250-251 on the clinical hallmark of SAH being a history of usually severe headache that started suddenly and other features being period of unresponsiveness, vomiting, I neck stiffness and to a question these were not present in deceased he replied "yes". At p. 252 to the statement "In patients

with direct trauma to the neck or with head injury associated with vigorous neck movement the trauma can immediately be followed by massive haemorrhage" he said this happened to the deceased. He agreed trauma can bring about rupture of aneurysm.

[16] In re-examination DW2 said the features of SAH may not be present in a patient with severe rupture as he would have become unconscious. When he prepared his opinion he did not have PW5's report dated 27 October 2011.

Finding On Reports And Opinion

[17] PW1 had given a reasonable explanation for the absence of external injuries and stated no berry aneurysm was found upon internal examination of the head. The post mortem report was consistent with the history of a fall and did not point towards spontaneous rupture of aneurysm. Although the cause of death was not stated as trauma it could be as a result of trauma. Her evidence shows death was due to the fall resulting in trauma.

[18] DW2's statement in his opinion that deceased had a full GCS for the first seven hours post trauma and on 7 June 2008 at around 3am would have thrown a fit and subsequently slipped into a state of coma (unconscious) is not supported by the medical reports he had referred to. In the medical report dated 2 July 2008 under history it was noted "alleged fall with seizure and became unconscious on 6 June 2008 7.30pm" and the post mortem where it is stated "On 7 June 2008 he fell backwards from a rocking chair. Five minutes later he fitted and post ictally he was unconscious." There is also no mention of full GCS for the first 7 hours post trauma.

[19] The statement that deceased most probably lost his balance due to the sudden changes in the hemodynamics of his brain secondary to the spontaneous rupture of the berry aneurysm causing SAH before he allegedly fell is not consistent with the evidence of the eye witness (PW2) that before deceased fell he was "tidak goyang-goyang". The evidence of PW1 is that during the internal examination of deceased head berry aneurysm was not found. PW1's evidence was that the post mortem did not point towards ruptured aneurysm.

[20] The statements of DW2 as above are therefore based on unproven facts. In *Pacific Tin Consolidated Corporation v. Hoon Wee Thim* [1967] 1 LNS 118; [1967] 2 MLJ 35 it was stated at p. 37:

> ... in all cases in which opinion evidence is receivable, whether from experts or not, the grounds or reasoning upon which such opinion is based may properly be inquired into. Where the opinion of experts is based on reports of facts, unless within the experts' own knowledge must be proved independently.

[21] Here DW2's opinion was based on medical reports and insurance claim forms. The statements were not within his personal knowledge and based on facts not proven and not in accord with the eyewitness' account. On the other hand, PW5's report is based on the case notes and his personal handling of deceased as his patient and took into account the evidence of PW2 relating to the fall followed by fits. PW5 also stated the symptoms of spontaneous rupture of aneurysm were not present in deceased.

[22] As to the pathological findings pointing towards a spontaneous rupture of the berry aneurysm DW2 attributed this to the lack of trauma to the head. However as explained by PW1 the absence of external injury such as bruises can be due to the manner of the fall. PW1 also stated if impact was not hard subarachnoid can bleed without subdural and subgaleal being injured. Thus even without external signs there can be trauma. Although the word "trauma" is not stated in the post mortem and specialist report, as explained by both PW1 and PW5, it is evident by the fact of deceased falling backwards and head hitting the floor and the words "alleged fall".

Bias Of PW5

[23] It was submitted PW5 as the doctor in attendance was bias. The cases of *Toth v. Jarman* [2006] EWCA Civ 1028 and *Robin Ellis v. Malwright Ltd* 68 Con LR 121 were referred to. In *Toth (supra)* the issue of non disclosure on conflict of interest in the form of membership of the Cases Committee of the Medical Defence Union was raised. According to defendant *Robin Ellis (supra)* states expert evidence is the independent product of the expert uninfluenced as to and content by the exigencies of litigation and an expert witness should not omit to consider

material facts which could detract from his concluded opinion. Here all parties and the court were aware PW5 was the doctor attending to deceased. The mere fact of PW5 being the doctor in attendance without more does not make him bias. It was not as alleged that PW5 needed to support his earlier conclusion given as PW5 had explained why there were two reports as the 1st report was in a simple format with no room for elaboration. Further the conclusion in the two reports remained the same. As to not having stated what was in the case notes of "Clinically patient was diagnosed as subarachnoid secondary to rupture berry aneurysm" this was explained as being part of different diagnosis which was considered and eventually ruled out. In the circumstances I do not find PW5 bias.

Medical Literature

[24] Although the article "Subarachnoid haemorrhage: diagnosis, causes and management" states "the cause of SAH is a ruptured aneurysm in 85% of cases" the clinical hallmarks of severe headache, period of unresponsiveness, vomiting and neck stiffness did not manifest themselves in deceased. In fact PW2 had given evidence deceased was not quiet during their conversation prior to the fall and had not complained of any neck or head stiffness. Although in re examination DW2 said the features of SAH may not be present in a patient with severe rupture as he would have become unconscious the fact of the matter is deceased had not exhibited theses features prior to becoming unconscious. Further deceased was a healthy person as gathered from the evidence. PW2 who was his colleague for 5-6 years said deceased had never seen a doctor for medical treatment or undergone any operation. According to Leong Hooi Chin (PW3, human resource manager of first plaintiff) deceased had been working with the company since 21 March 1999 and from the records he had not undergone any operation or treatment at a hospital. In 2008 deceased had not taken any medical leave.

[25] The aforesaid article also recognizes that "trauma and spontaneous SAH are difficult to disentangle. Patients may be found alone after having been beaten in a brawl or hit by a drunken driver who made away without external wounds to indicate an accident" (p. 251).

[26] PW5's statement that petechial haemorrhages of the white matter suggested contra coup injuries and diffuse axonal injuries and these are usually caused by trauma is supported by the article "Subarachnoid hemorrhage traumatic" where it is noted "the subarachnoid hemorrhage may be confined to focal areas which have been exposed to stresses during impact such as the frontal poles in an individual, who falls and strikes the back of his head giving rise to contracoup stresses" and "traumatic subarachnoid hemorrhage typically occurs in association with other traumatic injuries to the brain such as … diffuse axonal injury."

Other Matters

[27] It was also raised by defendant PW5 stated the post mortem did not determine what caused the subarachnoid haemorrhages and he didn't rule out ruptured aneurysm. This was clarified in re examination that he could determine what caused the subarachnoid haemorrhages from the case notes. As to him not ruling out ruptured aneurysm he hadn't ruled out anything but was stating the cause of death to be subarachnoid haemorrhages due to trauma.

Conclusion

[28] The collective medical evidence of PW1 and PW5 including their reports show deceased died as a result of the fall bringing about subarachnoid haemorrhages due to trauma. Coupled with the medical evidence is the eyewitness account of the fall and deceased being a healthy person. Parts of DW2's opinion as referred to earlier were unsupported by the facts. Plaintiffs have proven the death of deceased was due to the accident of the fall and the claim is allowed with costs.